Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

No. 94-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CRANE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* STANLEY RABUSHKA
and STANLEY RABUSHKA,
Respondents.

In Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does section 3730(e)(4)(A) of the False Claims Act, which divests district courts of subject matter jurisdiction over actions "based upon the public disclosure of allegations or transactions," bar an action when the alleged "public disclosure" disclosed no fraud?

II

When a district court determines solely on the basis of uncontradicted, documentary evidence that certain statements in that documentary evidence constitute allegations of fraud within the meaning of the False Claims Act, is that decision a finding of fact which a court of appeals should review under the clearly erroneous standard or a question of law which a court of appeals should review de novo?

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S. REP. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 8,12,13

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STATEMENT OF THE CASE

Respondent Stanley Rabushka brought this case pursuant to the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The FCA authorizes any individual to bring suit as a *qui tam* relator on behalf of the United States for frauds perpetrated against it. Rabushka, a former shareholder of Crane Company, has alleged that Crane masterminded and executed a scheme to defraud the federal Pension Benefit Guaranty Corporation ("PBGC") out of hundreds of millions of dollars. Specifically Rabushka has alleged that Crane misrepresented to the PBGC the true amount of unfunded, PBGC-insured pension plan liabilities of its former

subsidiary, CF&I Steel Corporation. CF&I's pension plan was so grossly underfunded that without the financial support of Crane, both the plan and CF&I were doomed to bankruptcy and an inevitable PBGC bailout.

In May 1985, Crane, which then owned 96.3% of the outstanding CF&I stock, divested itself of all ownership in CF&I by distributing its CF&I shares to Crane shareholders. Had the PBGC known of the truly staggering amount of CF&I's unfunded pension liabilities, it would have had no choice but to terminate the pension plan prior to the 1985 spin-off of CF&I, while Crane was still liable for the unfunded liabilities.

Just prior to the 1985 spin-off of CF&I, Crane ensured the success of its fraudulent scheme by hand-picking a new management for the about-to-be independent CF&I—a majority of the new CF&I directors were also members of Crane's board of directors.[1] After the spin-off, Crane and the newly selected CF&I management conspired to conceal Crane's fraud on the PBGC.

Crane schemed to conceal the true amount of underfunding long enough for CF&I plausibly to portray the massive underfunding as the result of post-spin-off events unrelated to Crane. Thus, in the proxy statement in which Crane proposed the spin-off, Crane falsely reported CF&I's unfunded pension plan liabilities to be the manageable sum of $46 million[2] at the end of 1984. Thereafter, the new CF&I directors gradually began to

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[1] In its 1985 proxy statement, Crane declared its intent to vote its 96.3% of CF&I shares in favor of the slate of nominees chosen by Crane. Of that slate of nominees for CF&I's new directors, five served as directors of both Crane and CF&I. Crane's proxy statement explained that the five common directors would constitute a majority of the CF&I board of directors and would "provide for continuity of experienced oversight of the business of CF&I."

[2] CF&I's net worth of $82 million, as reported by Crane in the 1985 proxy statement, would have been far more than sufficient to cover that underfunding.

reveal incrementally greater and greater amounts of the true underfunding: by the end of 1986, CF&I reported the underfunding to be $120 million and, by late 1990, $140 million.

By offering innocent explanations for these purported "increases," CF&I continued to hide the fact that its and Crane's representations to the PBGC were *fraudulent*, even after it could no longer completely hide the true extent of the massive unfunded pension liabilities. For instance, CF&I fraudulently explained the 1986 "increase" as being due to "early retirements," "reduced interest rates," "lower assumed average retirement age of active participants," and "the adoption of new accounting standards." When the PBGC finally terminated the pension plan in 1992 (over a year after Rabushka filed this lawsuit), it reported CF&I's unfunded liabilities to be approximately $270 million, more than five times the amount originally reported by Crane at the time of the spin-off.

Shortly after CF&I filed for bankruptcy in 1990, Rabushka filed this action against Crane and CF&I under seal in accordance with the requirements of the FCA. Reasoning that the PBGC had not yet terminated CF&I's pension plan and had thus not paid any claim, the district court dismissed the suit as premature. That dismissal came even before the district court had lifted the seal or authorized issuance of summonses to the defendants. Therefore, both Crane and CF&I were unaware of the suit at the time of that dismissal.

Rabushka appealed the dismissal. The court of appeals did not continue to treat the case as being under seal. Accordingly, while that appeal was pending, Crane learned of the suit through an article appearing on the front-page of *The New York Times*' Business Section,[3] which described the lawsuit and Rabushka's

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[3] DIANNA B. HENRIQUES, *A NAGGING PENSION QUESTION THREATENS CRANE*, N.Y. TIMES, March 29, 1992, section 3, p. 1.

allegations against Crane. Crane scrambled to intervene in the appeal, directly blaming — in Crane's own words — the "*premature public disclosure*" of Rabushka's allegations for a decline of over $60 million in the value of Crane's stock the day following the public disclosure of this case in *The New York Times*. Crane explained that the $60 million decline occurred on a trading volume which exceeded that for the entire previous week. In support of its motion to intervene, Crane bitterly complained that it and its shareholders would continue to suffer "from the uncertainty created in the marketplace by the publicity surrounding this case and they will continue to suffer until this cloud has been removed."

Meanwhile, the PBGC terminated CF&I's pension plan, rendering the appeal moot. The Eighth Circuit remanded the case to the district court, which then authorized issuance of summons to Crane. After being served, Crane responded to the complaint with a motion to dismiss for lack of subject matter jurisdiction based on section 3730(e)(4)(A) of the FCA, which divests district courts of subject matter jurisdiction over *qui tam* suits "based upon the public disclosure of allegations or transactions in a . . . civil . . . hearing . . . or from the news media." Notwithstanding the fact that only months before it had insisted in the court of appeals that Rabushka's allegations had been "prematurely publicly disclosed," Crane argued the diametric opposite in the district court: that Rabushka's allegations were a "rehash" of old news, a mere "second toot."

Rabushka readily acknowledged that the public disclosures to which Crane pointed — several newspaper articles and a statement made by CF&I's attorney in CF&I's bankruptcy proceedings — were, indeed, public disclosures. Rabushka pointed out, however, that because those public disclosures revealed no fraud, they were not "public disclosures" of "allegations or transactions" within the meaning of the FCA. The district court agreed with Rabushka that the word "allegation" means an

allegation of fraud, but the court disagreed that a transaction within the meaning of the FCA had to reveal the defendant's fraud: "'transaction' means just that, 'an act of transacting or conducting any business.'" Appendix to Crane's Petition (hereinafter "App."). at 45B (quoting BLACK'S LAW DICTIONARY at 1341 (5th ed. 1979)). Holding that Rabushka's suit was based on transactions that had been publicly disclosed — without any regard for whether those transactions revealed Crane's fraud — the district court agreed with Crane that Rabushka's suit was barred by section 3730(e)(4)(A). In addition, the court held that the statement made by CF&I's bankruptcy attorney was "essentially" an allegation of fraud. App. at 47B. The district court therefore dismissed the case for lack of subject matter jurisdiction.

The Eighth Circuit unanimously concluded that the district court's interpretation of section 3730(e)(4)(A) was overly broad.[4] On the application of the law to the undisputed facts of the case, however, the panel split. The panel majority first held that CF&I's attorney's statement did not constitute an allegation of fraud within the meaning of the FCA. The court also held that a "transaction" within the meaning of section 3730(e)(4)(A) must reveal a defendant's fraud, unlike any of the transactions relied upon by Crane and the district court. Accordingly, the court held that section 3730(e)(4)(A)'s jurisdictional bar did not apply, reversed the district court's dismissal, and thereafter denied both Crane's petition for rehearing and suggestion for rehearing en banc.

SUMMARY OF ARGUMENT

Although Crane claims that the Eighth Circuit's decision conflicts with the decisions of five other circuits, no such conflict

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[4] Even the dissenting judge "agree[d] with the majority that the district court's application of the jurisdictional bar whenever there is disclosure of the 'subject transactions' was too broad." App. at 10A n.3.

exists. In actuality the Eighth Circuit cited two of those decisions with approval and expressly adopted the holding of a third, as Crane itself acknowledges in its Petition. The court of appeals neither expressly nor implicitly departed from the holding of any federal court of appeals, and Crane's claim to the contrary is wholly contrived.

In addition, Crane claims that the court of appeals disregarded factual findings of the district court. That is patently false. The district court made no findings of fact because, as Crane itself has admitted in its Petition, "the evidence presented by Crane was documentary and not contradicted in any material respect."[5] The only issue was whether the "allegations and transactions" which Crane claimed bar this suit constituted "allegations or transactions" within the meaning of the False Claims Act. It was this point of law upon which the district court and the court of appeals disagreed, a legal issue which the court of appeals was obligated to review de novo.

The decision below was a straightforward application of the plain and unambiguous language of the FCA, and it does not conflict with the decision of any other federal court of appeals or of this Court. Accordingly, there is no question of law at issue that justifies the grant of a writ of certiorari in this case.

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[5] Crane's Petition at 13.

ARGUMENT

I. The Eighth Circuit's holding, that an "allegation or transaction" within the meaning of section 3730(e)(4)(A) of the False Claims Act must reveal the defendant's fraud against the government, is dictated by the plain language of the statute, completely supported by the legislative history, and absolutely consistent with the decision of every federal court of appeals to have addressed the issue

The FCA includes a *qui tam*[6] provision which broadly grants "a person" the right to "bring a civil action" for frauds perpetrated against the federal government. 31 U.S.C § 3730(a). Subsection 3730(e)(4)(A), however, jurisdictionally bars "an action under this section based upon the public disclosure of allegations or transactions in a . . . civil . . . hearing . . . or from the news media."[7] The gravamen of every FCA violation is getting the government to pay a "false or fraudulent claim."[8] Therefore, the only "allegations or transactions" which can serve as the basis of an FCA suit are ones which reveal that a false or fraudulent claim has been submitted to the government for payment or that the government has otherwise been defrauded of money or property. *See* 31 U.S.C. §3729(a).

Because an FCA action can never be "based upon" an allegation or transaction which does not constitute fraud against the

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[6] "*Qui tam* is an abbreviation for *qui tam pro domino rege quam pro seipso*, which means 'he who as much for the king as for himself.'" *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 647 n.1 (D.C. Cir. 1994) (quoting JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-6 (1993)).

[7] However, if the *qui tam* relator qualifies as an "original source," his suit is not barred even if it *is* "based upon the public disclosure of allegations or transactions" which have revealed the fraud. 31 U.S.C. §§ 3730(e)(4)(A)-(B).

[8] *See* 31 U.S.C. §§ 3729(a)(1)-(7).

government, it naturally follows that section 3730(e)(4)(A)'s jurisdictional bar is triggered only by allegations or transactions which reveal a fraud against the government. The Eighth Circuit's holding to that effect is nothing more than a straightforward application of section 3730(e)(4)(A)'s plain language.

The Eighth Circuit's holding is also abundantly supported by the legislative history to section 3730(e)(4)(A) and the case law interpreting it. "One theme recurring through the legislative history . . . is the intent to encourage persons with first-hand *knowledge of fraudulent misconduct* to report fraud." *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1153 (3d Cir. 1991) (emphasis added). "The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are *aware of fraud* being perpetrated against the Government to bring such information forward." H.R. REP. NO. 660, 99th Cong. 2d Sess. 22 (1986) (*quoted in United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)) (emphasis added). The Senate Report explained that "changes [in the *qui tam* provisions were] necessary to halt the so-called 'conspiracy of silence' that has allowed *fraud against the government* to flourish." S. REP. No. 345, 99th Cong., 2d Sess. (1986) 6 (emphasis added), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5271.[9]

The first and only other circuit ever to address whether a publicly disclosed "allegation or transaction" must reveal the defendant's fraud, was the District of Columbia Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). That court held that "*qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation of fraud." *Id.* at 654. "Many potentially valuable *qui tam suits* would be aborted by a reading of the jurisdictional provision that barred

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[9]Hereinafter "Senate Report." Page references will be to the U.S.C.C.A.N.

suits when the only publicly disclosed information was itself innocuous." *Id.*

Demonstrating its own misunderstanding of the jurisdictional bar, and of *Springfield*'s interpretation of it, Crane observes that "[i]ronically, under the [Eighth Circuit's] interpretation, the more flagrant its fraud and more bereft of innocent explanations for its conduct, the more likely a defendant is to escape a *qui tam* action . . . ."[10] That is precisely correct. As the *Springfield* court explained, once the fraud has been publicly disclosed, "there is little need for *qui tam* actions, which would tend to be suits that the government presumably had chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue." *Id.*

Only two courts have ever held that the jurisdictional bar can be triggered by "allegations or transactions" which do not reveal fraud against the government: the district court in *Springfield*, which the D.C. Circuit reversed, and the district court in the present case, which the Eighth Circuit reversed. By holding that the jurisdictional bar is triggered "only when specific allegations of fraud or the vital ingredients to a fraudulent transaction exist in the public eye," *Springfield*, 14 F.3d at 657, the Eighth and D.C. Circuits have simply held expressly what every other court has apparently considered to be self-evident.

Crane claims that the Eighth Circuit's decision "plainly conflicts" with the rulings of five other circuits,[11] yet Crane fails to

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[10] Crane's Petition at 10 note 9.

[11] Those five decisions from other circuits are: *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); and *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

explain that supposed conflict. In fact, no such conflict exists. The Eighth Circuit actually cited with approval two of the supposedly conflicting decisions, *Koch* and *Stinson*. App. at 3A. More importantly, unlike the present case, four of those cases — *Doe, Stinson, Koch* and *Wang* — did not even involve any dispute about whether the "allegation or transaction" revealed the defendants' frauds. Rather, the issue in those cases was whether the allegations or transactions at issue had been "publicly disclosed." That was never an issue in the present case because the district court relied only upon items which Rabushka acknowledged had been publicly disclosed. Thus, there is simply no merit to Crane's claim of conflict between the Eighth Circuit and the Second, Third, Ninth and Tenth Circuits.[12]

Crane's claim of discord between the Eighth Circuit's decision in this case and the D.C. Circuit's decision in *Springfield* (the fifth of the five cases) is even more incomprehensible and meritless. Despite this claim of conflict, Crane grudgingly (and condescendingly) admits that "[t]he court of appeals adopted

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[12] It is quite clear that each of the other courts took for granted that "allegations or transactions" would have to reveal fraud against the government. In *Doe*, for instance, the Second Circuit wrote that "[p]ublic disclosure of the allegations upon which the *qui tam* complaint rests is the bedrock of § 3730(e)(4)(A)'s jurisdictional bar. We have recently stated that *allegations of fraud* are publicly disclosed when they are placed in the 'public domain.'" 960 F.2d at 322 (emphasis added). In *Stinson*, the Third Circuit wrote that "because section 3730(e)(4) does not bar a *qui tam* action unless the action is based upon publicly disclosed 'allegations or transactions,' nothing contained here would bar suit by someone who learned *of the fraud* from an insider, if the information had not yet been publicly disclosed." 944 F.2d at 1161 (emphasis added). And in *Koch*, the court noted that the purpose of the jurisdictional bar was to curtail *qui tam* suits "by opportunists attempting to capitalize on public information without seriously contributing *to the disclosure of the fraud.*" 971 F.2d at 552. Likewise, in *Wang*, the Ninth Circuit wrote that the jurisdictional bar applies to "'those who come forward *after* public disclosure of possible False Claims Act violations[.]'" 975 F.2d at 1419.

what it understood to be the reasoning of [*Springfield*]."[13] Crane's discussion of this so-called conflict with *Springfield* exposes Crane's true criticism of the Eighth Circuit's decision, which is that, in Crane's opinion, the court of appeals "misapplied *Springfield* in this case."[14] Crane attempts to transform this alleged "contrast" between the facts of *Springfield* and "the facts in this case"[15] into a conflict between the two circuits. The Eighth Circuit's repeated citation to, quotation of and agreement with *Springfield* debunks Crane's claim of a conflict between the circuits regarding the proper interpretation of section 3730(e)(4)(A).

The 1986 amendments to the FCA broadened qui tam jurisdiction

Crane also attempts to portray the Eighth Circuit's decision as being at odds with the long history of the FCA. Although Crane argues that "[s]ince its enactment in 1863, the FCA has barred a *qui tam* action whenever the government had prior inquiry notice of the potential fraud,"[16] the fact is that from 1863 to 1943 plaintiffs could "bring[] suits based exclusively on information that was already in the government's possession." *Springfield*, 14 F.3d at 649. There was no jurisdictional bar of any kind to *qui tam* suits during that period. Indeed, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), this Court held that a *qui tam* relator who had merely copied a federal criminal indictment and converted it into a civil FCA *qui tam* complaint was not barred under the Act from doing so. The decision provoked Congress into "restrict[ing] the universe of litigants who could avail themselves of the FCA's *qui tam* provisions." *United States ex rel. S. Prawer and Co. v. Fleet Bank*, 24 F.3d 320, 325

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[13] Crane's Petition at 7.

[14] Crane's Petition at 8.

[15] Crane's Petition at 9.

[16] Crane's Petition at 11.

(1st Cir. 1994). "[T]he final 1943 legislation precluded all *qui tam* actions 'based on evidence or information the Government had when the action was brought.'" *Id.* (quoting 31 U.S.C. § 3730(b)(4) (repealed 1986)).

"Once again, the passage of time revealed that Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis." *Springfield*, 14 F.3d at 650. "*Qui tam* actions under the FCA had gone in forty years from unrestrained profiteering to a flaccid enforcement tool." *Doe*, 960 F.2d at 321. Congress recognized that "the most serious problem plaguing effective enforcement is a lack of resources on the part of the Federal enforcement agencies." Senate Report at 5272. "Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id.* Congress meant to cure this "most serious problem" by "encourag[ing] assistance from the private citizenry" in the form of whistleblower suits. *Id.* at 5273.

The legislative history thus puts the lie to Crane's unsupported claims that the 1986 amendments "restricted jurisdiction by barring suits . . . whenever the government was on constructive inquiry notice of possible fraud," that "Congress [in 1986] elected to constrain *qui tam* jurisdiction," and that "[t]he powerful enforcement arms of today's government do not require the 10,000 attorneys general which the Lincoln administration required."[17] To the contrary, Congress, "[c]oncerned about 'sophisticated and widespread fraud' depleting the national fisc, . . . concluded that 'only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.'" *Springfield*, 14 F.3d at 650-51 (footnote omitted) (quoting Senate Report at 5266-67). "As one means of encouraging private citizens to expose fraud, Congress repealed

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[17] Crane's Petition at 11, 12.

the 'government knowledge' jurisdictional bar to *qui tam* actions . . . and enacted *narrowly circumscribed exceptions to qui tam jurisdiction*." *Doe*, 960 F.2d at 321-22 (emphasis added). "In part, the 1986 amendments were 'aimed at correcting restrictive [court] interpretations of the act's . . . *qui tam* jurisdiction' provisions." *Wang*, 975 F.2d at 1419 (quoting the Senate Report at 5269).

Thus, the Eighth Circuit correctly applied *Springfield*'s holding that section 3730(e)(4)(A) is triggered only when "the essential elements exposing the transaction as fraudulent . . . [are] publicly disclosed." App. at 8A (citing *Springfield*, 14 F.3d at 655). Even prior to the 1986 amendments, when the FCA barred *qui tam* suits "based upon evidence or information in the possession of the United States," the mere fact that the government might have had in its possession "some information related to an allegedly false claim [did] not mean that suit under the Act is barred . . . ." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981). Rather, the information in the government's possession had to be "'sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute'" or "at least [sufficient to] have alerted law-enforcement authorities to the likelihood of wrongdoing . . . ." *Id.* (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978)). *A fortiori*, under the present and broader *qui tam* provisions, a public disclosure must at least, as the Eighth Circuit correctly held, "raise a reasonable inference of fraud" against the government, in order to trigger the jurisdictional bar.

The PBGC's investigation was not prompted by any alleged "public disclosure"

Crane belatedly and falsely claims for the first time in its present Petition that there was in this case "ample public information . . . to alert the PBGC to the likelihood of the false claim

alleged."[18] Crane well knows that this assertion is simply not true and lacks any shred of support in the record. The *only* evidence in the record is that *other individuals*—not public disclosures — had privately alerted the PBGC to Crane's fraud; there is not one scintilla of evidence in this case that the PBGC was aware of or acted upon any alleged public disclosures.[19]

The depositions of Crane's officers taken by the SEC in the course of an unrelated insider-trading investigation did not reveal Crane's fraud

Crane's assertion that the transcripts of depositions taken by the SEC in an unrelated insider-trading investigation were "public disclosures" is wrong. Even the district court did not rely upon the SEC depositions in its dismissal of this case. The mere fact that those deposition transcripts might have been theoretically available to the public "via a Freedom of Information Act request," as Crane alleges without the benefit of any evidentiary support,[20] does not mean that those transcripts have been publicly disclosed within the meaning of the FCA. The D.C. Circuit directly addressed this issue in *Springfield*. When materials are "only *theoretically* available upon the public's request," those materials "are not yet in the public eye" and do not trigger section 3730(e)(4)(A)'s public disclosure bar. 14 F.3d at 652-53.

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[18] Crane's Petition at 7.

[19] Crane apparently believes that Judge Magill's dissenting opinion in this case provides sufficient cover for Crane to make this outrageously deceitful claim. Judge Magill erroneously believed that one or more public disclosures had spurred a PBGC investigation of Crane. App. at 30A. Judge Magill made this mistaken assertion without any citation to any portion of the record. Even Crane had not taken this position in either the district court nor in the court of appeals, undoubtedly because there is absolutely no evidence which supports the claim.

[20] *See* Crane's Petition at 4 note 1.

More importantly, and not surprisingly, Crane's officers most certainly did not reveal their fraud on the PBGC during their SEC depositions. The SEC transcripts of those depositions — which Crane hardly mentioned in its brief in the court of appeals— simply show that Crane wanted to divest itself of ownership of CF&I because of its pension problems. Nowhere do the transcripts so much as hint that Crane had perpetrated or even considered perpetrating a fraud in order to get rid of CF&I. If, as Crane so adamantly insists, it committed no fraud, why would its own officers needlessly and recklessly jeopardize their company and their livelihoods, not to mention seriously risking criminal prosecution, by making such unfounded allegations? The answer is simple. Crane's officers did not reveal Crane's fraud in their SEC depositions, and Crane's claim to the contrary is not only false, it is entirely preposterous.

Crane's own initial reaction to this case after *The New York Times* published Rabushka's allegations is perhaps the most persuasive confirmation of the Eighth Circuit's conclusion that there were no prior "allegations or transactions" that revealed Crane's fraud. In its attempt to intervene in the previous appeal in this case, Crane bitterly complained that the *Times*' article was a "*premature* public disclosure." That claim exposes the utter disingenuousness of Crane's present claim that Rabushka's allegations are a mere "second toot" of prior public disclosures.

If, as Crane argued below, there had already been an "extensively covered," "exhaustively disclosed," "widely published" and "trumpeted" public tooting of Crane's fraud, then why did that supposed "first toot" not have consequences like the more than $60 million drop in the price of Crane's stock which Rabushka's supposed "second toot" caused? Since the alleged "revelations" of Crane's fraud by its own corporate officers in SEC depositions failed to cast a "cloud" over Crane, then how could the "second toot" of a mere shareholder like Rabushka cast a "cloud" over Crane? If there had already been a "widely

published" tooting of Crane's fraud, why did the stock market, as well as Crane, react to Rabushka's "second toot" as if they were hearing such allegations of fraud for the first time? This answer, too, is simple: Rabushka's allegations *were* the first public disclosure of Crane's fraud. Crane's frantic attempt to intervene in the appeal on the grounds that the "premature public disclosure" of Rabushka's allegations was having a "seriously negative impact" on Crane's stock, lays bare Crane's present "public disclosure" argument as nothing short of dissemblance.

The Eighth Circuit's decision in this case is not only consistent with the decisions of every other court of appeals which has interpreted the FCA's jurisdictional bar, it is correct on the facts as well. Accordingly, Crane's Petition for a Writ of Certiorari should be denied.

II. Crane's argument that the majority refused, in defiance of controlling Supreme Court and Eighth Circuit precedent, to review the district court's factual findings under the "clearly erroneous" standard is an absolute red herring, because the facts were undisputed and the only disagreement between the Eighth Circuit and the district court concerns the legal conclusions to be drawn from those undisputed facts

With all the drama — and accuracy — of Chicken Little's claim that the sky was falling, Crane claims that the Eighth Circuit's decision in this case "threatens to erode appellate court deference to the factual findings of trial courts."[21] Crane makes this alarmist claim despite the fact that the district did not make any findings of fact; despite the fact that, on this issue (too), the Eighth Circuit implicitly followed the D.C. Circuit's holding in *Springfield* that a court of appeals must review de novo a district court's "legal conclusions" drawn "from undisputed facts"; and despite the fact that the Eighth Circuit did not write so much as

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[21] Crane's Petition at 15.

a single word which could conceivably be interpreted as authorizing a departure from the "clearly erroneous" standard for reviewing a district court's findings of fact.

The reason that neither the panel majority nor the dissenting judge in this case discussed the applicable standard of review is that *there were no factual disputes for the court to review under any standard.* As Crane itself admitted in its brief in the court of appeals and has reiterated in its Petition, "the evidence presented by Crane was documentary *and not contradicted in any material respect.*"[22] It is well-established that "[w]here material facts are not in dispute, as in this case, [the appellate court will] review the district court's determination that it lacks jurisdiction de novo." *Drevlow v. Lutheran Church, Mo. Synod,* 991 F.2d 468, 470 (8th Cir. 1993). *Accord Springfield,* 14 F.3d at 655; *Herbert v. Nat'l Academy of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992); *Ynclan v. Dept. of Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 1990); *Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds* 482 U.S. 64 (1987); *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981).

The Court's decision in *Anderson v. City of Bessemer,* 470 U.S. 564 (1985), which Crane has cited, is completely irrelevant to the present case. In *Anderson*, this Court reversed the court of appeals for substituting its own assessment of disputed facts (such as whether a hiring committee was biased against hiring women) for the findings of the district court. To reiterate, there *are* no disputed facts in the present case. Rather, only the legal significance of the documentary evidence is in dispute: do the public disclosures upon which Crane relies constitute "the public disclosure of allegations or transactions" within the meaning of the False Claims Act, even though these disclosures revealed no fraud?

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[22] Crane's Petition at 13.

Even though in *Springfield* the D.C. Circuit addressed the precise issue presented here, that decision, which Crane features so prominently in the first half of its Petition, is conspicuously absent from this section of Crane's Petition. Crane's failure to cite *Springfield* is understandable, given the fact that the D.C. Circuit held in *Springfield* that, when the facts are undisputed, the issue of whether there have been publicly disclosed "allegations or transactions" within the meaning of section 3730(e)(4)(A) is a question of law to be reviewed de novo. 14 F.3d at 655.

In *Springfield*, the *qui tam* relator, Springfield, had obtained a federal arbitrator's (Quinn's) pay vouchers and telephone records through discovery in other litigation. Springfield conducted an investigation and discovered that Quinn "had fraudulently billed the government for days on which he had not actually worked on Springfield's dispute." *Id.* at 648. When Springfield later filed a *qui tam* FCA suit, Quinn moved to dismiss the action under section 3730(e)(4)(A), contending that the "allegations or transactions" underlying Springfield's suit had been publicly disclosed in the other litigation. The district court granted the motion, reasoning that Springfield's suit was "based upon" publicly disclosed information — Quinn's pay vouchers and phone records. *Id.*

As discussed more fully in the first section of this brief, the *Springfield* court held that only publicly disclosed "allegations or transactions" which reveal a defendant's fraud against the government come within the meaning of section 3730(e)(4)(A). Since the parties in *Springfield* did not dispute that the pay vouchers and telephone records had been publicly disclosed, "[r]esolution of the 'allegations or transactions' issue . . . d[id] not turn on 'a determination of fact which only a fact-finder could make but which has not been made." *Id.* at 655. As the court explained, "the district court *assumed without analysis* that the pay vouchers and telephone records disclosed during the discovery *constituted 'allegations or transactions'* within the

meaning of the jurisdictional bar." *Id.* at 653 (emphasis added). The court of appeals was thus required to engage in "independent review of the legal sufficiency of the district court's views and of its application of the law to undisputed facts." *Id.* at 655.

Just as the parties in *Springfield* did not dispute that the pay vouchers and telephone records had been publicly disclosed, the parties in the present case do not dispute that the statement made in a bankruptcy proceeding or that the newspaper articles relied upon by Crane were publicly disclosed. Therefore, just as in *Springfield* "[r]esolution of the 'allegations or transactions' issue . . . d[id] not turn on 'a determination of fact which only a fact-finder could make but which has not been made." Just as the D.C. Circuit had done in *Springfield*, the Eighth Circuit in the present case merely engaged in an "independent review of the legal sufficiency of the district court's views and of its application of the law to undisputed facts." The Eighth Circuit unanimously concluded that the district court's interpretation of section 3730(e)(4)(A)'s jurisdictional bar was "too broad," and the panel majority held, on the basis of the undisputed facts, that none of the public disclosures relied upon by the district court constituted "allegations or transactions" within the meaning of section 3730(e)(4)(A).

Moreover, any conclusion that there had been "allegations or transactions" which revealed Crane's fraud would have, indeed, been "clearly erroneous." The only "allegation" upon which Crane relied was the statement of CF&I's bankruptcy attorney, Frank Cummings, that "there were what we believe to be *miscalculations . . . by the actuary for this plan.*" As the Ninth Circuit has held in an FCA case based on faulty calculations: "Bad math is no fraud." *Wang*, 975 F.2d at 1420. Similarly, Mr. Cumming's allegation of "miscalculations" by an independently retained actuary could not possibly constitute an "allegation" of fraud against Crane within the meaning of the False Claims

Act.[23] The Eighth Circuit's review of the district court's application of the law to Cummings' undisputed statement was clearly appropriate, and its conclusion that the statement did not constitute an "allegation" of fraud within the meaning of section 3730(e)(4)(A) is beyond any rational dispute.

Likewise, the district court, under the mistaken belief that the "subject transactions" need not reveal fraud against the government, expressed no opinion as to whether the "transactions" did reveal any fraud. The Eighth Circuit carefully analyzed the newspaper articles which revealed those "transactions" — *i.e.*, Crane's 1985 spin-off of CF&I, the pension plan's post-spin-off troubles, and CF&I's 1990 bankruptcy filing — which, according to Crane, bar this suit. The court concluded:

> Although CF&I's pension funds were squarely in the public eye prior to Rabushka's suit, the available information cited by Crane reports seemingly legitimate transactions and fails to suggest to the uninitiated reader the state of affairs alleged by Rabushka — that CF&I's pension liability was intentionally understated and that the spinoff was concocted in the hope that Crane would avoid eventual liability. Rabushka was the first to assert that Crane officials knew that the underfunding at the time of the spinoff was

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[23] Crane's myopic focus on Mr. Cummings' statement entirely and indefensibly ignores the context of his remarks. Mr. Cummings also stated:

> The reason for the plan being — and I use the word in quotes — underfunded is the same reason that so many plans in the steel industry end up in this condition. You can be underfunded in this universe in any industry including steel *simply by obeying the law* which, when enacted in 1974, gave you 40 years to amortize the liability. . . . In addition, in the steel industry there are heavily subsidized special early retirement benefits built into the plan which occur when a facility shuts down and people are permanently laid off in connection with that shutdown.

In its full context, Mr. Cummings' statement can in no way constitute an allegation of wrongdoing.

> much greater than reported and that Crane officials were aware that the liability was sufficient to "sink" Crane if Crane was held responsible.

App. at 7A-8A. The Eighth Circuit's review of those articles was just like (and just as correct as) the D.C. Circuit's review of the pay vouchers and telephone records at issue in *Springfield*. In both cases the courts properly reviewed the undisputed, documentary evidence to determine, purely as a matter of law, whether that evidence constituted "'allegations or transactions' within the meaning of the jurisdictional bar." *Springfield*, 14 F.3d at 653. In both cases, the courts properly concluded that the FCA does not bar *qui tam* suits "when the only publicly disclosed information was itself innocuous," *id.* at 654, and "the publicly disclosed transactions involved do not raise . . . an inference of fraud." App. at 8A.[24]

The Eighth Circuit employed no language in its opinion to suggest some departure from the "clearly erroneous" standard for reviewing a district court's findings of fact. *Anderson v. City of Bessemer* is alive and well in the Eighth Circuit. The Eighth Circuit's decision does not, as Crane claims, undermine the "validity" of that decision, and there is thus no need for this Court to "restore" the unquestioned "validity" of that decision.

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[24] It is abundantly clear from the Eighth Circuit's opinion that the district court's decision could not withstand review even under the deferential, "clearly erroneous" standard. The "foremost" principle governing an appellate court's review under this standard is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948)). That is exactly how the Eighth Circuit felt about this case: "we 'are confident in this case that the information put in the public domain . . . did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction.'" App. at 8A (quoting *Springfield*, 14 F.3d at 656).

CONCLUSION

The Eighth Circuit's decision in this case does not conflict with the decisions of any other federal court of appeals. In fact, the Eighth Circuit explicitly adopted the reasoning and holding of the D.C. Circuit's decision in *Springfield*, notwithstanding Crane's unexplained criticism to the contrary.

In addition, the Eighth Circuit's decision does not question the applicability of a "clearly erroneous" standard of review to the findings of fact made by a district court. The district court in this case made no findings of fact to which the court of appeals could have applied that standard of review. Thus, the court of appeals did not even address itself to this non-issue, much less depart from the well-established case law of this Court and of the Eighth Circuit.

Accordingly, there is no question of law at issue that justifies the grant of a writ of certiorari in this case. Crane's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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